Supreme Court, U.S.
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NO. 88-1855

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

GAILE HENRY, SR.,
*Petitioner*

v.

BEAUMONT IRON & METAL CORPORATION, BEAUMONT IRON & METAL CORPORATION PROFIT SHARING PLAN, GAILE HENRY, JR., AND FIRST CITY NATIONAL BANK OF BEAUMONT,
*Respondents*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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20 pp

## QUESTION PRESENTED

Do the ERISA provisions governing prohibited transactions and prohibiting the alienation of plan benefits apply to actions taken with regard to distributions out of a qualified retirement plan after such distributions have been made and the plan has been terminated?

## LIST OF ALL PARTIES

GAILE HENRY, SR.

BEAUMONT IRON & METAL CORPORATION

BEAUMONT IRON & METAL CORPORATION PROFIT SHARING PLAN

GAILE HENRY, JR.

FIRST CITY NATIONAL BANK OF BEAUMONT

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*To The Honorable Supreme Court of the United States:*

### GROUNDS FOR DENIAL OF CERTIORARI

The Application for Certiorari should be denied. The decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals, or of a state court of last resort or of this Court. It is in keeping with

the accepted and usual course of judicial proceedings and does not call for this Court's exercise of its power of supervision. The case does not involve an important question of federal law.

## OPINIONS BELOW

The United States District Court of the Eastern District of Texas rendered summary judgment for Respondents on February 25, 1988 (Appendix A). Petitioner then appealed the judgment of the trial court to the Court of Appeals for the Fifth Circuit, where the Summary Judgment in favor of Respondents was affirmed on January 18, 1989 (Appendix B).

## STATEMENT OF THE CASE

Petitioner herein, Gaile Henry, Sr., brought this action against Respondents, Beaumont Iron & Metal Corporation ("the Corporation"), Beaumont Iron & Metal Corporation Profit Sharing Plan ("the Plan"), Gaile Henry, Jr., and First City National Bank of Beaumont ("the Bank"), alleging violations of the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., in connection with the distribution of monies out of the Plan. Throughout the period of time in question, Petitioner was the President of the Corporation, a member of the Corporation's Board of Directors, and an employee of the Corporation; the Corporation was the designated sponsor and administrator of the Plan; Gaile Henry, Jr. was the designated Advisory Committee of the Plan; and the Bank was the designated Trustee of the Trust maintained pursuant to the Plan.

On January 28, 1986 a note owed by Petitioner to the Corporation became due and payable. Petitioner failed to pay the principal and accrued interest as required by the terms of the note. As a result of Petitioner's default in the payment of the note, the Corporation initiated legal action against Petitioner on or about October 30, 1986 in the 58th Judicial District Court, Jefferson County, Texas in Cause No. A-125-223 (hereinafter referred to as the "State Court Action"). There are no facts in the records suggesting that the Bank entered an appearance or had any involvement, directly or indirectly, in any aspect of the State Court Action.

On June 13, 1986, at a meeting of the board of directors of the Corporation over which Petitioner presided as President, the Board of Directors voted to terminate the Plan. Later, on or about November 26, 1986, S. L. Greenberg ("Greenberg"), attorney for the Corporation, notified the Bank of the Board's decision to terminate the Plan, effective November 30, 1986, and requested distribution of all assets of the Plan to its participants. On December 24, 1986, the Bank distributed all funds from the terminated Plan to all participants entitled to receive distributions except for Petitioner. At or about the same time, Petitioner's attorney, acting with the actual, implied or apparent authority of Petitioner, requested that the Bank distribute to Greenberg two checks payable to Petitioner in the respective amounts of $79,146.19 and $200,000.00, with which request the Bank complied, on December 31, 1986. When this distribution was made, the Bank had no knowledge of the State Court Action pending between Petitioner and the Corporation or of the possible involvement of the distributed funds in that litigation.

On January 6, 1987, after the Plan had been terminated and all distributions had been made to the Plan participants, the State Court entered an Agreed Temporary Order, pursuant to an agreement between Greenberg and Petitioner's counsel, which required that the $200,000.00 check be placed in an account segregated from other funds of Petitioner and not distributed, transferred or pledged until further order of the State Court or an agreement in writing was signed by all parties.

Subsequently, Petitioner failed or refused to comply with the Order of January 6, 1987. The Corporation filed a Motion to Enforce the Agreed Temporary Order on February 17, 1987. After a hearing on February 24, 1987, the State Court entered an Order granting the Corporation's Motion and ordered deposit of the $200,000.00 check into the registry of the State Court. On April 16, 1987, the State Court granted a Judgment in favor of the Corporation against Petitioner for damages exceeding $250,000.00. As set forth in the Judgment, the $200,000.00 check deposited in the registry of the State Court was awarded to the Corporation as partial payment of these damages.

Sometime after the entry of the Judgment in the State Court Action, the Corporation reduced the principal balance owed on its indebtedness to the Bank. Contrary to the allegations stated in Petition for Writ of Certiorari, there is no evidence in the record that the funds distributed to Greenberg out of the Plan were ever used by the Corporation to reduce its indebtedness to the Bank.

## ARGUMENT AND AUTHORITIES

In its Petition for Writ of Certiorari, Petitioner asserts that the entry of the Agreed Temporary Order by the State Court on January 6, 1987 was an involuntary attachment, garnishment or other legal or equitable process against Petitioner's interest in the Plan, and that such order violated the anti-alienation provisions of ERISA and the Internal Revenue Code. Petitioner also asserts that the Corporation and Gaile Henry, Jr. engaged in prohibited transactions as defined by 29 U.S.C. § 1106. In Petitioner's view, the Bank is liable to Petitioner as a co-fiduciary for these supposed violations of fiduciary duties by the Corporation and Gaile Henry, Jr., pursuant to 29 U.S.C. § 1105.

In response, the Bank would first show the Court that, as a matter of law, the anti-alienation rules were applicable to Petitioner's plan benefits only until the Bank made a distribution of those benefits. The law is settled that once monies are distributed out of a qualified plan, the distributed funds are no longer protected from attachment by creditors even though such funds may be traced back to a plan fully protected by the provisions of ERISA. *Tenneco, Inc. v. First Virginia Bank of Tidewater*, 698 F.2d 688, 691 (4th Cir. 1983). In this case, the distribution of funds to Petitioner was completed on December 31, 1986, prior to the entry by the State Court of the Agreed Temporary Order restricting the transfer of such funds.

Second, the record is undisputed that, as a matter of law, Petitioner was in actual or constructive receipt of his interest in the Plan on December 31, 1986. On that date, the Bank distributed the two checks to Greenberg

with the consent of Petitioner's duly authorized attorney, who received them for and on behalf of the Petitioner. Being a cash basis taxpayer, the Petitioner is subject to the constructive receipt doctrine. Thus, he is deemed to have received income not in his actual possession if such funds were nonetheless available to him in such a manner that his control over them was not subject to any substantial limitations or restrictions. 29 U.S.C. § 451(a). *Arnwine v. C.I.R.*, 696 F.2d 1102 (5th Cir. 1983). The fact that the $200,000.00 check remained uncashed or undeposited until February 24, 1987, when Petitioner physically endorsed it under Court Order, is irrelevant in determining the date of distribution. In addition, in *Arnwine,* the Fifth Circuit Court of Appeals held that the receipt of income by the taxpayer's agent subject to self-imposed limitations on actual distribution to the taxpayer was actual receipt under the agency theory. In this case, there is no dispute that Petitioner's attorney, acting on his behalf and at his request, authorized Greenberg to take possession of the $200,000.00 check so that Petitioner would be in receipt of the check for tax purposes in 1986. Thus, Petitioner was in receipt of the $200,000 check prior to the State Court's Order of January 6, 1987.

Third, the provisions of ERISA applicable to prohibited transactions do not apply to Plan benefits after distribution or termination of the Plan, as a matter of law. The Plan was terminated prior to the Corporation taking any action with respect to Petitioner's retirement benefits in the State Court Action. It has been previously held that ERISA fiduciary standards, including the rules against prohibited transactions, are inapplicable to transactions in which a Trustee has allegedly engaged *after*

the employer/sponsor of the Plan has voluntarily terminated the Plan in accordance with 29 U.S.C. § 1341 *et seq. District 65, U.A.W. v. Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468 (S.D.N.Y. 1983).

Fourth, Petitioner's conduct in the State Court Action estops him from challenging the Bank's actions since, as the facts show, all the Bank ever did was what Petitioner asked him to do. Accordingly, the Petitioner is equitably estopped from claiming that the distribution of Plan benefits was improper or unauthorized. See Brief of Appellee, First City National Bank of Beaumont, filed with the United States Court of Appeals for the Fifth Circuit, page 32.

There are additional grounds for affirming the decision below. For example, the facts are undisputed that Petitioner failed to exhaust his administrative remedies under the Plan after receipt of a denial of benefits which, as a matter of law, bars him from asserting any entitlement to such benefits prior to termination of the Plan. See Brief of Appellee, First City National Bank of Beaumont filed in the United States Court of Appeals for the Fifth Circuit, page 35. Additionally, the undisputed facts show that, as a matter of law, Petitioner was not entitled to a distribution of Plan benefits prior to the termination of the Plan, since Petitioner did not terminate service during 1985 or 1986, a condition precedent to entitlement. See Brief of Appellee, First City National Bank of Beaumont, filed in the United States Court of Appeals for the Fifth Circuit, page 42.

Finally, it should be noted that Petitioner's case against the Bank is based wholly on suspicion, innuendo, and inferences lacking any basis in fact. There is no evidence

in the record of a formulated plan or concerted action by the Corporation and the Bank "directed towards the purpose of obtaining [Petitioner's] retirement benefits for the purpose of reducing [the Corporation's] loan to the Bank." There is no evidence in the record that the Bank "closely monitored" progress of the State Court Action. In fact, the evidence is undisputed that prior to distribution of the checks to Greenberg, the Trust Department of the Bank did not know of the State Court Action or of any alleged attempt or threatened attempt by the Corporation to subject the distribution to the State Court's orders. The Fifth Circuit's opinion correctly analyzed the legal issues and the facts in the record and reached the correct result.

Petitioner's argument that reversal of the Circuit Court's decision is necessary in order to avoid rendering the prohibitions of ERISA meaningless is nonsense. Without citing this Court to a single statute, regulation or case which would impose the fiduciary duties of ERISA upon a trustee *after* termination of a plan and distribution of its assets, Petitioner is asking this Court to expand the protections of ERISA beyond the bounds intended by Congress or contemplated by prior decisions of this Court.

## CONCLUSION

The Circuit Court correctly affirmed the granting of the Summary Judgment in favor of the Respondent, First City National Bank of Beaumont, and Certiorari should be denied.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN

By: _____

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## CERTIFICATE OF SERVICE

A copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been sent to each of the below named parties on this _____ day of June, 1989.

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JAMES L. WEBER

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C. A. NO. B-87-0503-CA

GAILE HENRY, SR.

v.

BEAUMONT IRON AND METAL CORPORATION, BEAUMONT IRON AND METAL CORPORATION PROFIT SHARING PLAN, GAILE HENRY, JR., and FIRST CITY NATIONAL BANK OF BEAUMONT

(Filed February 25, 1988)

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND FINAL JUDGMENT

ON THE 25th day of February, 1988, came on to be considered the Defendants, Beaumont Iron and Metal Corp. ("Beaumont Iron"), Beaumont Iron and Metal Corp. Profit Sharing Plan ("Profit Sharing Plan"), Gaile Henry, Jr., and First City National Bank of Beaumont ("First City")'s Motions for Summary Judgment. The Plaintiff, Gaile Henry, Sr.'s Motion for Summary Judgment also came on for consideration. The Court, after reviewing the Defendants' Motions, the Plaintiff's Response thereto, the Plaintiff's Motion and the Defendants' Responses in Opposition thereto, as well as the affidavits, exhibits, arguments and authorities submitted by the respective

counsel, finds that a distribution to Gaile Henry, Sr. (Plaintiff herein) of his vested benefits in the terminated Profit Sharing Plan was made to him, and the distributed funds were not thereafter protected by ERISA. The Court finds that no improper alienation, attachment or garnishment occurred as a result of the conduct of, or actions by the Defendants in Cause No. A-125,223 before the 58th Judicial District Court, Jefferson County, Texas (hereinafter "state court action"). At the time the Plaintiff filed this litigation (April 10, 1987), all funds had been distributed from the Profit Sharing Plan Trust Account and the Profit Sharing Plan had been terminated. Additionally, Plaintiff failed to exhaust his administrative remedies as required by the Profit Sharing Plan and ERISA during the time preceding the distribution of his retirement benefits. Although funds may be traceable to an ERISA approved plan, the Court finds that those funds are not protected by ERISA once distribution is made. The Court also finds no evidence that First City, as Trustee of the Profit Sharing Plan, breached any of its fiduciary duties to Plaintiff. Based on the foregoing, the Court finds that Defendants are entitled to summary judgment, as no genuine issue of material fact exists; that the Defendants have no liability to the Plaintiff under ERISA or the causes of action set forth in Plaintiff's Original Complaint. The Defendants' Motions for Summary Judgment should be granted that the Plaintiff take nothing by reason of his suit. The Plaintiff's Motion for Summary Judgment should be denied. It is, therefore,

ORDERED, ADJUDGED and DECREED that the Defendants, Beaumont Iron and Metal Corp., Beaumont Iron and Metal Corp. Profit Sharing Plan, Gaile Henry, Jr., and First City National Bank of Beaumont's Motions

for Summary Judgment are hereby GRANTED and said Defendants are DISCHARGED from any liability to the Plaintiff and judgment is awarded the Defendants that the Plaintiff take nothing by reason of this suit. It is further,

ORDERED, ADJUDGED and DECREED that the Plaintiff, Gaile Henry, Sr.'s Motion for Summary Judgment is hereby DENIED.

SIGNED this 25th day of February, 1988.

/s/ Signature Illegible
United States District Judge

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 88-2192

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GAILE HENRY, SR.,
Plaintiff-Appellant,

v.

BEAUMONT IRON & METAL CORP., ET AL.,
Defendants-Appellees.

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Appeal from the United States District Court for the
Eastern District of Texas
(CA-B-87-0503)

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(January 18, 1989)

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Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:*

The summary judgment in favor of the defendants is affirmed because, as the district court said in its order

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

of February 25, 1988, the Profit Sharing Plan was terminated and full distribution of plaintiff's benefits was made to him in 1986. Plaintiff's attorney agreed to the termination of the plan in November and to the trustee bank's delivery on December 31 of checks payable to plaintiff, to be held by S. L. Greenberg. This delivery was made in order to ensure that plaintiff would be deemed to have received this distribution in 1986 for income purposes.

Prior to 1987 there is no evidence that any defendant breached a fiduciary duty owed to plaintiff under ERISA or the plan. The bank acted only as was authorized by plaintiff. Plaintiff on January 6, 1987 agreed to the court's order under which the $200,000 was to be deposited and to be subject to subsequent court judgment. That election by plaintiff and the court's subsequent judgment cannot be undone by the present suit, because the $200,000 was not protected by ERISA on January 6, 1987, and could not be said to have been wrongfully attached.

AFFIRMED.